COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, LLC, Complainant, v. VERIZON MA NEW ENGLAND, (f/k/a New England Telephone and Telegraph Company), and NORTHEAST UTILITIES SERVICE COMPANY, d/b/a Western Massachusetts Electric Company, and THE MASSACHUSETTS ELECTRIC COMPANY, Respondents.	)	D.T.E. 03-56

MEMORANDUM OF LAW
OF FIBER TECHNOLOGIES NETWORKS, L.L.C.
IN OPPOSITION TO MOTIONS TO DISMISS

Fiber Technologies Networks, LLC, f/k/a Fiber Systems, LLC, ("Fibertech") opposes the motions to dismiss filed by Verizon MA New England ("Verizon"), Northeast Utilities Service Company, d/b/a Western Massachusetts Electric Company ("WMECO"), and Massachusetts Electric Company ("MECO")(collectively, the "Respondents" or "utilities").

The utilities want to terminate Fibertech's statutory and contractual right of access to poles, conduits, and rights of way, but they do not want the Department of Telecommunications and Energy to consider if they may take such extreme measures. Their motions represent a premature effort to dispose of issues that call for DTE factfinding and considered policymaking

based on a record of all of the facts and circumstances, rather than giving improper preclusive effect to interlocutory rulings or to the utility respondents' adhesionary contracts. The Department should carry out its responsibility pursuant to G.L. c 166, § 25A and 220 C.M.R. 45.00 et seq. to conduct a hearing on this complaint.

STATEMENT OF FACTS

Fibertech is a wholesale network provider that offers primarily dark fiber optic networks to a wide range of communications providers and institutions. Without access to poles, conduits, and rights-of-way owned by such utilities, Fibertech cannot install its cables. At the same time, Fibertech is a direct competitor to Verizon, to WMECO's affiliate NEON Communications, and MECO's affiliate NEESCom in the provision of wholesale telecommunications services. Because of the delays and unreasonable and discriminatory practices with which the respondent utilities processed its applications for pole attachment and conduit licenses, it has brought its complaint in this matter under 47 U.S.C., § 224; G.L. c. 166, § 25A; and 220 C.M.R. 45.00 et seq.

Fibertech entered into an initial Master License Agreement with Verizon on March 7, 2000; with MECO on March 17, 2000; and with WMECO on March 31, 2000 (collectively the "Agreements"). The Agreements purport to establish the rates, terms, and conditions on which Fibertech would obtain access to Verizon and WMECO poles and conduits. Pursuant to these Agreements, Fibertech sought for over two years to gain access to utility poles and conduits by following the Respondents' process for licensing such facilities. During this time, the Respondents failed to respond in a timely way to Fibertech's license applications, and when such responses finally were received, they contained charges, terms, conditions and "make-ready" cost estimates that Fibertech considered unreasonable and contained requirements that Verizon

and WMECO have not imposed on themselves or other pole attachers, including WMECO's affiliate NEON.

The Amended Complaint details at length – and the Respondents' answers dispute – these charges, terms, conditions and "make-ready" costs, identifying in the body of the pleading as well as attached exhibits each pole to which an unreasonable or discriminatory make-ready charge or requirement has been applied.[1] Fibertech's Amended Complaint compares its experience nearby in Connecticut, where it was able to build some 400 route miles at an average cost of less than $3,600 per mile in the same time that it has been able to build only 20 route miles at an average cost of more than $25,000 per mile in the Respondents' territories in Western Massachusetts.

The new complaint alleges that four types of safety allegations that were at the heart of the utilities' Superior Court complaints are pretextual, unreasonable, and discriminatory, as demonstrated by a survey showing that the same conditions exist on 50 percent of all the plaintiffs' poles. These four categories were: (1) attaching too close to the secondary electric facilities at the pole (within 40 inches); (2) attaching too close to the secondary electric facilities at mid-span between poles (within 30 inches); (3) boxing of a pole, including where the pole had already been boxed by Verizon; and (4) use of extension arms to achieve additional clearance between Fibertech's cable and other companies' facilities. Fibertech contends in its Amended Complaint that its installation was fully consistent with industry standards and the vast majority of alleged violations with respect to proximity to electrical facilities on poles were nonexistent. Fibertech also contends that boxing of poles and the use of extension arms are consistent with

[1] Fibertech has not identified with the same specify conduit affected by Verizon's "go fish" procedure for conduit applications because Verizon's practice make such an allegation impossible. It is the essence of Fibertech's complaint that Verizon lack of cooperation in supplying information for conduit applications forces Fibertech to guess at what conduit routes it should apply for.

relevant construction guidelines, and that even Verizon has used boxing and has approved the use of extension arms in other states.

This Amended Complaint is the latest chapter in the parties' dispute concerning the Agreements. On June 21 and 22, 2002, in order to deliver service to a customer and preserve its funding, Fibertech installed facilities on poles owned by the plaintiffs. On June 22, 2002 Fibertech informed Verizon of its installations and acknowledged its obligation to pay the pole rental rate set in the parties' agreements and to pay make-ready charges subject to the parties' dispute about the reasonable amount of such charges. The parties discussed resolving their differences informally or requesting DTE intervention. Rather than bring this matter to the Department, however, Verizon and WMECO raced to the courthouse and commenced actions in Superior Court, followed a month later by MECO. The utilities' state court complaints allege, among other things, that Fibertech is in violation of its master Aerial License Agreements, and sought injunctive relief on the basis of allegations that the manner in which Fibertech attached its cables created safety hazards.

On August 14, 2002, Fibertech submitted a complaint with the DTE against Verizon and WMECO. It also moved at that time to dismiss the Verizon court complaint, followed with similar motions to dismiss the WMECO and MECO complaints. These motions and opposing papers were filed September 4, September 12, and November 11, 2002, respectively.

The Superior Court issued a Memorandum of Decision on Plaintiffs' Motions for Preliminary Injunction ("*P.I. Order*").[2] Although the Court granted the Plaintiffs' motions for preliminary injunction, it did so primarily based upon safety issues on the poles. The court at that time left open the issues of jurisdiction to adjudicate the ultimate issues in the case.

[2] A copy of the Preliminary Injunction Order has previously been supplied to the Department.

On December 24, 2002, the DTE dismissed Fibertech's complaint without prejudice due to the lack of specificity of the complaint. Fibertech filed a motion for reconsideration of this order, which the Department has not taken up. After it conducted the pole survey on which the Amended Complaint is based, Fibertech repleaded its complaint with the DTE on May 14, 2002. This Amended Complaint addresses deficiencies identified in the Department's order of dismissal without prejudice.

On May 23, 2003, the Superior Court denied Fibertech's motions to dismiss the Verizon and WMECO actions with just two sentences, stating "The defendant has not demonstrated that the plaintiff's claims should be dismissed because of pre-emption by an primary jurisdiction [sic] of the DTE. It also appears that a stay of these proceedings is not warranted for the reasons set forth in defendant's opposition." Fibertech today filed an interlocutory appeal of this order of dismissal with the Massachusetts Appeals Court. Copies of Fibertech's Petition for Relief Under M.G.L. c. 231, §118 (First Paragraph) and supporting memorandum of law are attached.

ARGUMENT

I. Fibertech's Right To Challenge The Terms And Conditions Of Pole Attachment Agreements Is Fundamental To The Scheme Of Pole Attachment Regulation.

The contention by Verizon and MECO that Fibertech cannot "collaterally attack" terms and conditions of its pole attachment agreements flies in the face of well-established law on pole attachments. Because utility poles, conduits, and rights of way are essential services for the delivery of wireline competition, the FCC long has permitted pole attachers to "sign and sue."[3] The United States Court of Appeals for the District of Columbia Circuit recently affirmed this "sign and sue" rule allowing a party to file a complaint to contest provisions of a pole attachment

[3] *See implementation of Section 703(e) of Telecommunications Act of 1996, Amendment of the Commission's Rule and Policies Governing Pole Attachments, Report and Order*, CS Docket No. 97-151, 13 F.C.C.R. 6.777, 6,780-90 ¶ 16-21 (Feb. 6, 1998); *In Matter of Amendment of the Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section* 703(e) *of the Telecommunications Act of 1996, Consolidated Partial Order on Reconsideration*, 16 F.C.C.R. 12, 103, 12,112 ¶ 12 (May 25, 2001).

it believes are unfair. The court found this approach reasonable in light of "the agency's duty under the statute to guarantee fair competition in the attachment market." *Southern Company Services, Inc. v. FCC,* 313 F.3d 574, 583 (D.C. Cir. 2002).

DTE regulations obviously contemplate the same approach, since General Laws Chapter 166, § 25A "parallels the federal statute…." *Petition of New England Cable Television Association, Inc*." D.P.U. 930 at 3 (1984). Moreover, DTE regulations explicitly apply to "terms and conditions" and provide in 220 C.M.R. 45.04(2)(a) for submission of "the attachment agreement" involved and a statement that the complainant "has attachments;" such requirements would be impossible to meet unless the complainant had signed an agreement already. Review of the reasonableness of contractual provisions includes not only reasonableness of the provisions themselves, but also "reasonableness of pole owner practices in implementing such provisions." *Newport News Cablevision, Ltd. v. VEPCO*, 7 FCC Rcd 2610, 2610 ¶4 (1992). Likewise, in its Section 271 review of access to Verizon's pole, conduits, and rights of way, the Department left the door open to complaints of discriminatory practices in administering pole attachment agreements, limiting its findings to "the context of checklist compliance only" with the Department's findings "in no way considered precedential" in any such proceeding. *In the Matter of Verizon New England, Inc. under Section 271 of the Telecommunications Act of 1996*, FCC CC Docket No. 00-0176, *Evaluation of the Massachusetts Department of Telecommunications and Energy* at p. 248 (filed Oct. 16, 2000).

The FCC and the United States Court of Appeals for the District of Columbia Circuit rejected an attempt to turn a dispute about terms and conditions applicable to unauthorized attachments into a plain contact case in *Public Service Co. of Colorado v. FCC*, 328 F.3d, 675 (D.C. Cir. 2003). In that case, the court recently affirmed the agency decision rejecting the

argument that the pole attacher in that case "was merely looking to avoid the contractual remedy for its unauthorized attachments." *Id.* at 676-77. The utilities in this case make almost the identical argument and the Department, too, should reject it.

II. The Reasonableness Of The Utilities' Remedies For Unauthorized Attachments Is A Matter For The Department To Decide Pursuant To Its Authority To Regulate Rates, Terms, And Conditions Of Pole Attachments.

As the *Public Service Co. of Colorado* case demonstrates, remedies for unauthorized attachments are terms and conditions of pole attachment agreements that are subject to the Department's review. Unauthorized attachments happen. *Cf. id; A-R Cable Service, Inc. v. New England Telephone and Telegraph, d/b/a NYNEX*, D.P.U. 95-116 (complaint against unreasonable charges and practices imposed as a remedy for unauthorized attachments; case settled). Indeed, Article XII of the Agreements explicitly addresses unauthorized attachments.[4] Thus, notwithstanding the utilities' posturing in their motions, this dispute is no different from any others involving terms and conditions of pole attachment agreements.

In *Public Service Co. of Colorado*, the court affirmed the FCC's ruling that the utilities' remedy for some ***25,000*** unauthorized attachments (payment of five times the monthly rental rate) was unreasonable. Here, the contract termination the utilities are seeking amounts to capital punishment – termination of Fibertech's statutory and contractual right of access to poles and rights of way. Fibertech's Amended Complaint explicitly presents the Department with the contention that termination of the contracts is an unreasonable term and condition under these circumstances, including the utilities' unreasonable and unlawful delays and make-ready charges and the Hobson's Choice their conduct presented Fibertech.

[4] Article XII requires the licensee to submit an application for an unauthorized attachment within 15 days of receiving written notice from the utility of such attachment, and establishes a presumption for purposes of applicable charges that the attachment has been in place since the date of the Agreement.

Verizon and MECO argue that the Department should dismiss the complaint as a matter of policy. By making their arguments on this basis, however, the utilities actually concede that remedies for unauthorized attachments are a matter for DTE policymaking. In this vein, Verizon raises the specter that entertaining Fibertech's complaint would open the door to "vigilantism" in unauthorized attachments. But the way to address unauthorized attachments is not to abdicate oversight. And the policy concerns Verizon and MECO raise must be balanced against the goal of the 1996 Telecommunications Act to foster competition in the local exchange services, and to open utility poles, conduits and rights of way to competitors.

WMECO puts the same argument in terms of "unclean hands." This, however, is an equitable doctrine. Having argued as a basis for court jurisdiction that the Department lacks equitable powers, WMECO can hardly turn around and urge the Department to decide this motion summarily as a matter of equity.

The parties evidently agree that this dispute presents questions for the Department to decide as matters of policy and application of its rules and regulations. For the purposes of a motion to dismiss, the Department must accept the factual allegations of the Amended Complaint as true. The Department therefore cannot and should not attempt to resolve the important issues presented without conducting the hearing required by 220 C.M.R. 1.06 and 45.04(g).

III. Fibertech's Complaint Presents Factual Disputes That Are In No Way Precluded.

Other than WMECO's and MECO's contention that Fibertech has not submitted affidavits,[5] the utilities do not suggest that Fibertech's Amended Complaint is factually insufficient. On the contrary, the Amended Complaint and the utilities' answers present a bona

[5] 220 C.M.R. 45.04(4) serves to submit evidence to support a pole attachment complaint. Fibertech's Amended Complaint is amply supported with documents and summaries that provide evidence of the delays and practices imposed by the utilities. To the extent that this rule requires a person to swear to the truth of the allegations, as WMECO and MECO demand, Fibertech submits herewith the Affidavit of Frank Chiaino as Exhibit A. The Department should accept this affidavit *nunc pro tunc* rather than require Fibertech to re-file a complaint, the factual sufficiency of which the respondents do not otherwise contest.

fide factual dispute concerning the utilities' delays, unreasonable and discriminatory make-ready requirements, and their own widespread pole attachment practices of the very kind that they claimed as an imminent health and safety risk when used by Fibertech. They reflect a factual dispute that can only be resolved by the required hearing.

All of the utilities seek to sidestep this factual dispute by relying extensively for factual support on the Hampden Superior Court's preliminary injunction order. But a preliminary injunction order is necessarily the product of "an abbreviated presentation of the facts and law" in which "the judge's assessment of the parties' lawful rights at the preliminary stage of the proceedings may not correspond to the final judgment." *Packaging Industries Group v. Cheney*, 380 Mass. 609, 616 (1980). In this case, the preliminary injunction presentation was further abbreviated by the plaintiffs' claim of imminent danger and by the judge's imminent vacation;[6] the subsequent delays in the utilities carrying out the remedies permitted by the court and the widespread existence of the same conditions on poles throughout Massachusetts belie that preliminary showing. Both the Superior Court decision and the Department's dismissal without prejudice are interlocutory decisions. "[A]ny action of the court short of final judgment or decree remains within the control of the court and is open to revision until final judgment or decree." *DeMatteo v. Board of Appeals of Hingham*, 3 Mass. App. Ct. 446, 457 (1975).

Because these decisions have no preclusive effect, the Department is free to make its own assessment of the facts and circumstances of this case.[7] It should do so by determining the facts and circumstances in a hearing, and exercising its primary jurisdiction over the terms and

[6] Transcript of August 14, 2002 Hearing on Motion for Preliminary Injunction at pp. 11-14 (previously submitted to the Department).

[7] WMECO and MECO argue that Fibertech's Amended Complaint is somehow precluded by its filing a motion for reconsideration in D.T.E. 02-47. This argument is made entirely without support in Department regulations or precedent, and ignores the meaning of "without prejudice." Nothing precludes Fibertech from partially mooting its motion by acceding to the D.T.E. 02-47 order's pleading requirements.

conditions of remedies for unauthorized attachments, as the FCC did in *Public Service of Colorado*.

IV. The Municipal Grants Of Location Are Not A Condition Precedent to Fibertech's Amended Complaint.

The Respondents assert that Fibertech is not a "licensee" for purposes of the pole attachment statute and regulations because it has not received municipal grants of location. This argument is based on the Department's Order on Summary Decision in *Fiber Technologies Networks, LLC v. Shrewsbury Electric Light Plant*, D.T.E.01-70 (Dec. 24, 2002), in which the Department held that dark fiber is "a facility used in transmission of intelligence" and qualifies as an "attachment" within the meaning of G.L. c. 166, §25, but that to be "authorized" to construct lines or cables upon, along, under and across public ways, "a company engaged in transmission of intelligence" must also have municipal grants of location. Fibertech has filed a motion for reconsideration of this decision. For the reasons stated in that motion, which Fibertech incorporates by reference here, Fibertech believes the Department should and will reconsider its inadvertent change in industry practice. The Department should not compound its prior mistake in this case.

In any event, the utilities have waived this argument in this case because, rather than raising it at the threshold of an agreement like the Shrewsbury Electric Light Plant, they entered into pole attachment agreements with Fibertech and, by their own admission, have embarked on a course of dealing with Fibertech under those agreements and have issued pole attachment licenses. Likewise, they are estopped from making this argument, since Fibertech in turn has relied on these Agreements to pursue individual pole attachments at considerable expense and delay. *Cf. Uccello v. Gold'n Food, Inc.*, 325 Mass. 319, 329-30 (1950)(estoppel by "a course inconsistent with subsequent repudiation").

Under the theory initially adopted in *SELP* and now picked up by the utilities, a competitive "telecommunications provider" that is entitled to access to utility poles under 47 U.S.C. § 224, may not be eligible for pole access in Massachusetts. As demonstrated in Fibertech's motion for reconsideration, the resulting void in access rights under Massachusetts law would give rise to jurisdiction on the part of the FCC to regulate pole access. *See id.*, § 224(c)(f) (states must certify they regulate access of any "telecommunication carriers").

Fibertech's motion for reconsideration also demonstrates that a regulatory framework that lets incumbent utilities tell municipalities what requirements should be imposed on competitive providers, to demand that competitors prove that the "necessary" approvals have been received and judge the sufficiency of the proffered evidence, and to deny the competitors access to their poles unless they are satisfied with this showing is antithetical to successful development of competition. Municipal requirements should be determined and enforced by the municipalities independently, as they are being in this instance to the evident satisfaction of the municipalities. *See* Affidavit of Kim Lonobile ("Lonobile Aff."); Affidavit of Wallace Short ("Short Aff."); and Affidavit of Mario R. Rodriguez (Rodriguez Aff."), submitted herewith as Exhibits B, C, and D; Letter from the Honorable Michael A. Tautznik, (filed as public comment, June 23, 2003); and Letter from the Honorable Mary Clare Higgins (filed as public comment, June 19, 2003).

Although the utilities allege that Fibertech is not entitled to attach to their poles because it did not obtain the necessary approval of the municipalities of Agawam, West Springfield, Easthampton, and Northampton, [8] Fibertech communicated closely with each of these municipalities to determine their requirements. Each reported that its requirements were limited to work permits to be issued by their public works departments for street excavation and police permits, relating to traffic control, for excavation and for installation work involving either

[8] *See* Verizon Massachusetts' Memorandum of Law in Support of its Motion to Dismiss, p. 4.

existing underground conduit or existing poles. Lonobile Aff. Such limited requirements are fully consistent with both Massachusetts and federal law.

Subsequently, the Cities of Easthampton and Northampton informed Fibertech that they in fact did require grants of location for the installation of Fibertech's lines. Short Aff. Although such a requirement likely contravenes federal law where Verizon also has not obtained grants of location for installation of additional wires, Fibertech has negotiated terms with Easthampton that are acceptable to it (although Verizon asserts the city does not have the right to enter this agreement). Fibertech remains committed to finalizing agreements with the Cities of Easthampton and Northampton.

Attached to the Rodriguez Affidavit as Attachment 2 are 16 grants of location issued by the City of Easthampton to WMECO and Verizon, which are fairly reflective of the documents that have been used for the issuance of grants of location for utility poles in Easthampton, Northampton, Agawam, and West Springfield. Each of the 16 grants of location authorizes the erection of a pole or poles at the locations described therein and the installation of "wires, cables and fixtures" "as [the utilities] may find necessary." This grant encompasses a pole ***and*** any wires that might be subsequently attached to the pole. It is within the realm of reasonableness to interpret such a grant of location as encompassing the installation on the authorized poles of wires to be owned by competitive providers as well as wires to be owned by the utilities.[9]

Not only is a municipality justified in interpreting an authorization for the installation of a pole and associated wires as authorizing the installation of wires owned by a competitor of the pole owners, but such an interpretation may be necessary to comply with the nondiscrimination requirements of federal law. Section 253 of the Communications Act prohibits states and

[9] Upon information and belief, this is the implicit rationale underlying the fact that the municipalities have not required new grants of location as preconditions to the attachment of wires and cables by cable television companies or other competitive telecommunications providers such as WMECO's affiliate NEON and MECO's affiliate NeesCom.

localities from imposing requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service",[10] except that they may "manage the public rights-of-way … on a competitively neutral and nondiscriminatory basis."[11] To deny a competitive provider authorization to install a wire on an existing pole after already granting to the incumbent service providers its approval to attach unlimited wires and cables would not constitute management of the public rights of way on a competitively neutral basis.

Such neutrality is especially important to broadband telecommunications competition. Verizon apparently has succeeded recently in procuring a new federal policy that will permit it to deploy new broadband facilities that it will not have to share with competitors. Pursuant to such a policy, competitors will need to reach customers with their own broadband facilities if they are to sell services that rely on high-speed connectivity. The result of this policy will be a rush to reach customers with fiber-optic facilities and to sign up the customers with long-term service contracts. This modern-day Gold Rush will be won by the swift. The respondents' preferred view of Massachusetts law, forcing competitors to obtain new municipal grants of location before they can assert a legal right of access to the utilities' poles while the utilities themselves may simply install all fiber-optic cables "as they may find necessary," would insure the competitive triumph of the incumbents over competitors – and the ultimate failure of competition.

The Department should not entertain the utilities' belated effort to throw grants of location up as an obstacle to Fibertech's Amended complaint, especially as the municipalities

[10] 47 U.S.C. § 253 (a).
[11] *Id*. § 253 (c).

themselves want to see Fibertech's facilities remain to bring competitive broadband services to their communities.

CONCLUSION

For the foregoing reasons, the Department should deny the utilities' motions to dismiss, and proceed with this case in accordance with 220 C.M.R. 1.06 and 45.00 et. seq.

Respectfully submitted

Cameron F. Kerry, BBO #269660
Kimberly Collins, BBO #643405
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
617-542-6000

Charles B. Stockdale
Robert T. Witthauer
Fibertech Networks, LLC
140 Allens Creek Road
Rochester, New York 14618
(716) 697-5100

Dated: June 23, 2003